Supreme Court, U.S.
FILED

011854 JUN 17 2002

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No. ___

IN THE

Supreme Court of the United States

JOHN T. LUNDY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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June 17, 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

52 pgs

QUESTIONS PRESENTED

1. Whether the prohibition of false statements intended to influence a bank's decision found in § 1014 of Title 18 includes within it all omissions of information intended to influence the bank's decision.

2. Whether a statute which forbids false statements may, consistent with the Due Process clause and the Rule of Lenity, be read to include mere silence.

LIST OF PARTIES AND AFFILIATES

The parties to the proceedings in the Fifth Circuit are Petitioners John T. Lundy and Gary Matthews and the United States of America as the Respondent.

Pursuant to Rule 29.6 of the Rules of this Court, petitioner states that it has no parent corporations and it has issued no publicly held stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES AND AFFILIATES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Reasons for Granting the Petition	4
B. Expansion of the Statute	5
C. The Appellate Court's Reading of the Statute is Unprecedented	8
D. Rule of Lenity and Due Process	14
CONCLUSION	17

TABLE OF AUTHORITIES

CASES	Page
Chiarella v. U.S., 445 U.S. 226 (1980)	13
Crandon v. U.S., 494 U.S. 152 at 160 (1990)	16
Emery v. American General Finance, Inc., 71 F.3d 1343 (7th Cir. 1995)	13
Fasulo v. U.S., 272 U.S. 620 (1926)	14
Kolender v. Lawson, 461 U.S. 356 at 357 (1983)	15
Liparota v. U.S., 471 U.S. 419 (1985)	7
Morisette v. U.S., 342 U.S. 246 (1952)	7
Reynolds v. East Dyer Development Co., 882 F.2d 1249 (7th Cir. 1989)	13
Staples v. U.S., 511 U.S. 600 (1994)	7
U.S. v. American Trucking Assoc., Inc., 310 U.S. 534 (1940)	16
U.S. v. Bars, 404 U.S. 336 (1971)	14
U.S. v. Brown, 79 F.3d 1550 (11th Cir. 1996)	13
U.S. v. Crop Growers Corp., 954 F.Supp. 335 (D.D.C. 1997)	10, 16
U.S. v. Diogo, 320 F.2d 898 (2nd Cir. 1963)	5, 10
U.S. v. Dupre, 117 F.3d 818 (5th Cir. 1997) *cert. denied* 522 U.S. 1078 (1998)	8
U.S. v. Doke, 171 F.3d 240 (5th Cir. 1999) *cert. denied* 528 U.S. 907 (1999)	8, 9
U.S. v. Greene, 578 F.2d 648 (5th Cir. 1978) *cert. denied* 439 U.S. 133 (1979)	8
U.S. v. Irwin, 654 F.2d 671(10th Cir. 1981) *cert. denied* 455 U.S. 1016 (1982)	13
U.S. v. London, 550 F.2d 206 at 212 (5th Cir. 1977)	9, 15
U.S. v. Ron Pair Enterprises, Inc. 489 U.S. 235 (1989)	14
U.S. v. Trice, 823 F.2d 80 at 86 (5th Cir. 1987)	8
U.S. v. Watts, 72 F.Supp. 2d 106 (E.D.N.Y. 1999)	10

TABLE OF AUTHORITIES—Continued

Page

U.S. v. Wells, 519 U.S. 482 (1997) 7, 8, 9, 15
U.S. v. Wiltberger, 18 U.S. 35 (5 Wheat 76 at 95) (1820) 15
U.S. v. X-Citement Video, Inc., 513 U.S. 64 (1994) 7, 8
Williams v. U.S., 458 U.S. 279 (1982) ... 5, 6, 7, 13, 14, 15

STATUTES

18 U.S.C. § 215(a) 2
§ 371 2
§ 1001 ..... 9, 15, 16
§ 1014 ..... *passim*
§ 1344 2
§ 1546 10
28 U.S.C. § 1254(1) 1

OTHER

Restatement of 2d Contracts
§ 161 12
Restatement of 2d Torts
§ 551 ..... 11, 12
Fifth Amendment to the United States Constitution 1
Sarah Newland, *The Mercy of Scalia: Statutory Construction And The Rule of Lenity*, Harvard Civil Rights-Civil Liberties Law Review at 197 (Winter 1994) 16

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PETITION FOR A WRIT OF CERTIORARI

John T. Lundy through counsel respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is reproduced in the Appendix to this Petition at 1a. The Order of the Court of Appeal denying the petitions for rehearing is published in the Appendix at 26a.

JURISDICTION

The judgment of the Court of Appeals was entered on January 28, 2002 and motions for rehearing were denied on March 20, 2002. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part that:

> "No person shall . . . be deprived of life, liberty, or property without due process of law . . ."

2. Section 1014 of Title 18 of the United States Code provides in pertinent part that:

> "Whoever knowingly makes any false statement . . . for the purpose of influencing in any way the action of any institution the accounts of which were insured by the Federal Deposit Insurance Corporation . . . upon any application . . . or loan or any change or extension of . . . the same . . . shall be fined not more than $1,000,000 or imprisoned not more than thirty years, or both."

STATEMENT

On December 11, 1998 Petitioner was indicted by a federal grand jury. The indictment charged him with conspiring to commit the offenses of bank fraud, bank bribery, and making false statements to a federally insured institution all in violation of 18 U.S.C. § 371; and with committing the substantive offenses of bank fraud in violation of 18 U.S.C. § 1344; bank bribery in violation of 18 U.S.C. § 215(a); and three counts of making a false statement to a federally insured financial institution in violation of 18 U.S.C. § 1014. C.A.R. at 298. On September 18, 1999 a superceding indictment was filed. The superceding indictment restated the previous charges but added a fourth count of making false statements to a federally insured financial institution in violation of 18 U.S.C. § 1014. C.A.R. at 152. The case proceeded to trial on January 18, 2000. C.A.R. 298. On that date the government dismissed two of the counts of the indictment alleging false statements (C.A.R. 298). On February 2, 2000 the trial court

dismissed another of the false statement counts. C.A.R. 413. During trial the government proposed a jury instruction that defined "false statement" for the purposes of 18 U.S.C. § 1014 as follows:

> "A person makes a false statement under this statute if he fails to disclose material information to a federally insured bank in connection with a loan transaction." Transcript, Vol. I at p. 18.

Petitioner objected to this instruction arguing that it defined false statement too broadly (Transcript, Vol. IX at pp. 137-148); and that it erroneously permitted a jury to convict on the basis of the omission of information which Petitioner ". . . was never asked, [and] had no legal obligation to provide . . ." (Transcript, Vol. IX at p. 146). Petitioner offered specific examples of how the requested instruction would apply to circumstances clearly not contemplated by the statute. Transcript, Vol. IX at p. 141. The trial court expressed its doubts about the instruction but eventually accepted it. Transcript Vol. IX, pp. 142, 147, 148. The trial court's instructions were applicable to both the substantive count of false statement and the conspiracy to make false statements. The trial court also instructed the jury that an agreement to make false statements constituted a conspiracy as charged in Count I of the indictment and that membership in that conspiracy would permit the jury in certain circumstances to convict Petitioner of other substantive offenses committed by his co-defendant. Transcript Vol. X, p. 15. The contested definition of false statement, therefore, potentially infected all counts of the indictment.

On February 7, 2000 the jury returned a verdict of guilty of one count of conspiracy, one count of bank fraud, one count of making a false statement, and one count of bank bribery. From that conviction Petitioner appealed to the Fifth Circuit Court of Appeals. The appeal asserted among other things that the trial court's definition of false statements was

overbroad and violated both the *Rule of Lenity and Due* Process notice requirements. On January 28, 2002 the Appellate Court denied Petitioner's appeal. In addressing Petitioner's arguments regarding the definition of "false statement", the Appellate Court stated:

> ". . . the § 1014 instruction required finding Defendants intentionally failed to disclose material information to a federally insured bank regarding a loan transaction *for the purpose of influencing its lending activities*, which is more than the statute requires. *See* 18 U.S.C. § 1014. There is no error, plain or otherwise.
>
> With respect to Defendants' remaining contentions concerning the § 1014 instruction, and as discussed above, an intentional omission of material fact can constitute a false statement if made for the purpose of influencing a federally insured bank's lending activities."

Appellate Court's decision at pp. 26-27.

It is this holding of the Appellate Court that Petitioner challenges. Petitioner filed petitions for rehearing and rehearing en banc with the Appellate Court, which were denied on March 20, 2002. Appendix at page 26a.

A. Reasons For Granting The Petition.

As described in detail below, the Court of Appeals has in this matter decided an important question of federal law that has not been but should be settled by this Court. That decision involves an interpretation of the prohibition found in § 1014 of Title 18 of false statements intended to influence the actions of a federal or federally insured financial institution. The Court of Appeals reads § 1014's prohibition of false statements to include a prohibition of all omissions of information intended to influence the banks action. Such a reading of the statute dramatically increases its purview and

by implication the purview of many other false statement statutes. It does so in a manner that brings within the statute's prohibition a broad range of common and innocuous business practices. If permitted to stand such a reading will result in the unintended disruption of widely accepted business practices and the imposition of unjust punishment on many borrowers.

The Appellate Court's decision is also impliedly inconsistent with the decisions of this Court and the several Appellate Courts which have defined "false statement" more narrowly. These decisions include *Williams v. U.S.*, 458 U.S. 279 (1982), and *U.S. v. Diogo*, 320 F.2d 898 (2nd Cir. 1963).

The Court of Appeals found no error in a jury instruction that defines false statement under Section 1014 as the failure to disclose material information to a federally insured bank in connection with a loan transaction for the purpose of influencing its lending activities. Appellate decision at page 26. As explained below such a holding works an enormous, unprecedented, and unwarranted expansion of the statute and interprets the statute in a manner which is both inconsistent with its plain wording and gives no notice of that which it prohibits.

B. Expansion of the Statute

The first problem with the Appellate Court's holding is its overbreadth. It interprets the statute in a manner that makes it applicable to most loan negotiations with federally insured institutions. By defining false statement to include all omissions intended to influence the lending activity, the appellate court brings within the aegis of the statute all loan negotiations in which the borrower has deliberately not told the bank some fact with the hope of influencing the negotiations. One need only consider a few examples to realize the breadth of this interpretation. Consider the borrower who is willing and able to pay a ten percent interest

on a loan under negotiations but negotiates a loan at a rate of eight percent without telling the bank that he was willing and able to pay ten percent. As § 1014 is interpreted by the Appellate Court, this borrower could be sentenced to thirty years in prison for omitting a fact with the intention of influencing the banks lending decision. Similar results would apply to borrowers who do not tell one bank of the offers made by their competitors or who do not tell the bank officer their religion because they believe it lessens the likelihood of their receiving the loan. The possibilities are endless. Thus a statute that on its face serves the noble and logical purpose of prohibiting false statements to a federally insured bank has now been read to prohibit routine and innocuous activity that occurs in many and probably most loan transactions. This Court has previously expressed its concern over the potential expansion of § 1014 into areas of seemingly unremarkable conduct. In *William v. U.S.*, 458 U.S. 279, 286-87 (1982), the Court rejected an interpretation of §1014 that would have greatly broadened its purview.

> "Equally as important the Government's interpretation of § 1014 would make a surprisingly broad range of unremarkable conduct a violation of federal law. While the Court of appeals addressed itself only to check kiting, its ruling has wider implications: it means that any check, knowingly supported by insufficient funds, deposited in a federally insured bank could give rise to a criminal liability, whether or not the drawer had an intent to defraud."

Williams v. U.S., supra at 286.

> "Yet if Congress really set out to enact a national bad check law in § 1014 it did so with a peculiar choice of language and in an unusually backhanded manner. . . . Absent support in the legislation history for the proposition that § 1014 was designed to have general application to the passing of worthless checks [citation

> omitted] we are not prepared to hold petitioners conduct proscribed by *that particular statute.*"

Williams v. U.S., supra at 287.

The same theme was addressed in *U.S. v. Wells*, 519 U.S. 482, 498 (1997), where the Court accepted a particular interpretation of § 1014 in part because it would not effect an unwarranted expansion of the statute.

> "It is true that we have held § 1014 inapplicable to depositing false checks at a bank, in part because we thought that it would have "made a surprisingly broad range of unremarkable conduct a violation of federal law; *Williams v. U.S.*, 458 U.S. at 286-287 n.8, . . . and elsewhere thought it possible to construe a prohibition narrowly where a loose *mens rea* requirement would otherwise have resulted in a surprisingly broad statutory sweep, see *U.S. v. X-Citement Video, Inc.*, 513 U.S. 64, 71-72 . . . but an unqualified reading of § 1014 poses no risk of criminalizing so much conduct as to suggest that Congress meant something short of the straight-forward reading. The language makes a false statement to one of the enumerated financial institutions ~~a crime only~~ if the speaker knows the falsity of what he says and intends it to influence the institution."

U.S. v. Wells, supra at 499-500.

The Court has also read other criminal statutes narrowly in order to avoid including within their purview ". . . a broad range of apparently innocent conduct "*Liparota v. U.S.*, 471 U.S. 419, 426 (1985). *See e.g. Staples v. U.S.*, 511 U.S. 600 (1994) (Court rejected a statutory reading which would criminalize behavior that a defendant believed fell within a long tradition of widespread lawful gun ownership by private individuals); *Morisette v. U.S.*, 342 U.S. 246 (1952) (Court reads scienter requirement into welfare statute to avoid criminalizing broad range of apparently innocent conduct);

and *U.S. v. X-Citement Video, Inc.*, 513 U.S. 69 (1994) (Court reads *mens rea* requirement into child pornography statute to avoid criminalizing otherwise innocent activity). More than any of the cases cited above this case presents the risk of expanding a criminal statute into broad areas of innocuous and apparently innocent activity. Moreover, in each of the cited cases the language of the statute could plausibly be read to suggest the broader reach. The Court's decisions in those cases turned not so much on the wording of the statute as on the fact that the broader reading reached into areas of seemingly innocent conduct. That same principle applies to this case but with the additional impetus that the plain wording of the § 1014 requires the narrower reading.

C. The Appellate Court's Reading of the Statute Is Unprecedented

The Appellate Court has cited no case which supports its interpretation of § 1014, and a review of the case law reveals no similar interpretation by any court in America. While there are numerous cases which hold that omissions may in certain circumstances constitute false statements under § 1014, no case suggests that all omissions intended to influence the banks decision constitute false statements. As noted above, this Court in *U.S. v. Wells*, supra at 500, has stated that § 1014 is applicable only ". . . if the speaker knows the falsity of what he says . . ." Such a requirement is inconsistent with the Appellate Court's definition of "false statement" in this case. Even in the Fifth Circuit the case law requires that only omissions needed to avoid deception may constitute false statements under § 1014. *See U.S. v. Dupre*, 117 F.3d 818, 819 (5th Cir. 1997); *U.S. v. Trice*, 823 F.2d 80, 86 (5th Cir. 1987); and *U.S. v. Greene*, 578 F.2d 648, 657 (5th Cir. 1978). There is no case in the Fifth Circuit or elsewhere which goes further. The Appellate Court's reliance on *U.S. v. Doke*, 171 F.3d 240, 246 (5th Cir. 1999), for its new definition of "false statement" is inappropriate. *Doke* is

a "straw" borrower case where the straw borrower falsely told the bank that he was putting his own money into the deal and omitted telling them he was fronting for the real borrower who could not borrow more money because of the bank's lending limits. *Doke*, therefore, fits neatly into the cases relying on omissions needed to avoid deception. There is a very big difference between an omission of information on one hand and an omission of information needed to avoid deception on the other. One remarkable aspect of the Appellate Court's decision is that it both untethers the definition of "false statement" from the concept of deception and requires no affirmative act by the borrower. No previous case has done this. If the decision below is allowed to stand, omissions not intended to deceive will now constitute felonies punishable by up to 30 years in prison. While there is no case which specifically rejects the holding of the Appellate Court, there is much which impliedly rejects it. In the 54 years since the inception of § 1014, no court appears to have suggested an interpretation similar to that adopted by the Appellate Court in this case. The *United States Code* contains at least 100 false statement statutes. *U.S. v. Wells*, supra at 505 (dissent). Counsel has been unable to locate a single case interpreting any of those statutes in a manner consistent with the Appellant Court's decision in this case but many that reject such logic. The cases dealing with 18 U.S.C. § 1001 provide a good example. Section 1001 forbids among other things false statements in matters of federal jurisdiction. It is therefore similar to § 1014 which forbids false statements to certain federal and federally insured financial institution. In this very similar statute, the courts have rejected the Appellate Court's conclusion in this case.

> "The requirement of an affirmative act is implied in the second clause of § 1001 by the statutes proscriptions of false statements."

U.S. v. London, 550 F.2d 206, 212 (5th Cir. 1977).

> "Thus a false representation charge requires that the defendant made a misrepresentation or used a document that contained a false statement or entry *in other words that the defendant made some sort of active misrepresentation.* [emphasis added]

U.S. v. Crop Growers Corp., 954 F.Supp 335 (D.D.C. 1997).

> ". . . where a statute or regulation imposes no duty whatever to disclose information due process concerns require that criminal liability not be based on omission of such information."

U.S. v. Crop Growers Corp., *supra* at 345.

In *U.S. v. Diogo*, 320 F.2d 898 (2nd Cir. 1963), the Court in interpreting both Section 1001 and Section 1546 of Title 18 (forbidding false statements in immigration applications) rejected "mere omissions" as a basis for a false statement case.

> "We do not read the quoted passage to suggest that a prosecution for false representations can be grounded upon omission of an explanation which omission carries with it implications of a state of facts which were not . . . true. To so hold would distort the language of the statute . . ."

U.S. v. Diogo, *supra* at 905.

While the above cited cases deal with false statement statutes other than § 1014, they all deal with statutes similar to § 1014 and reflect a logic equally applicable to § 1014. *See* also *U.S. v. Watts*, 72 F.Supp 2d 106, 117 (E.D. N.Y. 1999) (defenses described in *Diogo* are equally applicable to § 1014).

That the Appellate Court's holding in this case is inconsistent with American legal notions of what constitutes a false statement is reflected in the Restatement of Law.

Two provisions of the Restatement of Law deals with a non-disclosure. The first is § 551 of *Restatement of 2d Torts* which provides as follows:

"§ 551. LIABILITY FOR NONDISCLOSURE

1. One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.

2. One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,

   a. matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and

   b. matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and

   c. subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so; and

   d. the falsity of a representation not made with the expectation that it would be acted upon, if he subsequently learns that the other is about to act in reliance upon it in a transaction with him; and

   e. facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the

relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts."

The second applicable provision is found in § 161 of the *Restatement 2d Contracts*, which provides:

"§ 161. WHEN NON-DISCLOSURE IS EQUIVALENT TO AN ASSERTION

A person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist in the following cases only:

a. where he knows that disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation or from being fraudulent or material.

b. where he knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.

c. where he knows that disclosure of the fact would correct a mistake of the other party as to the contents or effect of a writing, evidencing or embodying an agreement in whole or in part.

d. where the other person is entitled to know the fact because of a relation of trust and confidence between them."

These two standards for civil liability well reflect American legal concepts of when an omission may constitute false statement. Notably they are both significantly inconsistent with the holding of the Appellate Court. Indeed it is difficult to find any support in either criminal or civil law for the proposition espoused by the Appellate Court that all

omissions intended to influence loan negotiations constitute false statements.

In the closely related concept of fraud, the case law is similarly inconsistent with the notion that mere omissions may constitute a crime.

> "At common law, misrepresentation made for the purpose of inducing reliance upon the false statement is fraudulent. But one who fails to disclose material information prior to the consummation of a transaction commits fraud only when he is under a duty to do so. And the duty to disclose arises when one party has information 'that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them.'"

Chiarella v. U.S., 445 U.S. 226, 227-28 (1980).

> "And of course there can be no criminal conviction for failure to disclose when no duty to disclose is demonstrated."

U.S. v. Irwin, 654 F.2d 671, 679 (10th Cir. 1981) *cert. denied* 455 U.S. 1016 (1982).

See also U.S. v. Brown, 79 F.3d 1550, 1556-57 (11th Cir. 1996); *Emery v. American General Finance, Inc.*, 71 F.3d 1343, 1347 (7th Cir. 1995); and *Reynolds v. East Dyer Development Co.*, 882 F.2d 1249, 1252 (7th Cir. 1989). The relevance of the fraud cases is further supported by this Court's decision in *Williams* to reject a broader reading of § 1014 in part because it included acts which did not include an intent to defraud. *Williams v. U.S.*, supra at 286.

The Appellate Court in this matter has concluded that under § 1014 all omissions intended to influence the bank's decision constitute false statements and are therefore punishable under the statute. This conclusion is inconsistent

with all existing precedent, as well as American notions of what constitutes and actionable false statement.

D. Rule of Lenity and Due Process

The Appellate Court in this case has interpreted a prohibition of "false statements" to federally insured banks to include within it all omissions of information intended to influence the bank's decision. The Court's failure to comport its holding to the plain wording of the statute violates the related concepts found in the Rule of Lenity and Due Process clause of the Fifth Amendment. The beginning point for all statutory interpretation is, of course, the wording of statute. Where that language is plain the inquiry should end. *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). The language of § 1014 is plain. In applicable part, it forbids the knowing making of a false statement for the purpose of influencing any loan. It cannot reasonably be argued that this language was plainly intended to cover all omissions of information intended to influence the loan. However, were there any ambiguity in the statutory language the Rule of Lenity requires that ambiguity be resolved in Petitioner's favor.

> ". . . before one can be punished it must be shown that his case is plainly within the statute."

Fasulo v. U.S., 272 U.S. 620, 629 (1926).

> "when choice has to be made between two readings of what Congress has made a crime, it is appropriate before we chose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."

U.S. v. Bars, 404 U.S. 336, 347 (1971).

Indeed in circumstances more conducive to a broad reading of § 1014 than those here at bar this Court has relied on the Rule of Lenity to require the narrower reading. *See Williams*

v. U.S., supra at 290. Such a reading is consistent with ancient and fundamental principles of American jurisprudence.

> "The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle, that the power of punishment is vested in the legislature not in the judicial department."

U.S. v. Wiltberger, 18 U.S. 35, 43 (5 Wheat 76, 95) (1820).

That the Appellate Court's reading of § 1014 flies in the face of these maxims is evident both in the plain wording of the statute and in other interpretations of the meaning of "false statement." For example as previously noted, this Court has interpreted the language of § 1014 to require proof that the author of the false statement "know the falsity of what he says . . ." *U.S. v. Wells, supra* at 500. The Appellate Court 's reading of § 1014 implicitly rejects that requirement. In interpreting a similar prohibition of "false statements in § 1001 the Fifth Circuit held that the requirement of an affirmative act is implied in § 1001 by the statutes prohibition of false statements." *U.S. v. London, supra* at 212.

Closely related to the Rule of Lenity is the Due Process requirement of fair notice. This doctrine requires:

> ". . . that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."

Kolender v. Lawson, 461 U.S. 356, 357 (1983).

In the *Williams* case, the Court concluded that the term "false statement" would not commonly be used to describe a bad check. (*Williams v. U.S.*, supra at 286.) Similarly in this

case common usage would not define "false statement" as every omission of information, nor would ordinary people conclude that a law forbidding false statements to a bank required them to unilaterally inform the bank of all facts that might influence its decision regardless of whether the bank asks about those facts. In analyzing § 1001 the Court in *Crop Growers Corp.* concluded that ". . . where a statute or regulation imposes no duty whatever to disclose information, due process concerns require that criminal liability not be based on omission of such information." *U.S. v. Crop Growers Corp.*, supra at 905. This conclusion is further supported by the Absurd Result Principle. This principle rejects even the plain wording of statutes if that wording leads to an absurd and plainly unintended consequence. *See U.S. v. American Trucking Assoc. Inc.*, 310 U.S. 534, 543 (1940). As reflected in the example described above, the Appellate Court's interpretation of § 1014 in this case leads to an absurd and plainly unintended result. It must therefore be rejected.

Finally, the legislative history of § 1014 does not alter the conclusions reached above. Notions of the importance of legislative history may vary. *See The Mercy Of Scalia: Statutory Construction And The Rule of Lenity* by Sarah Newland, Harvard Civil Rights-Civil Liberties Law Review at 197 (Winter 1994). However, no view of legislative history would work a change in the conclusions described above.

> ". . . it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text."

Crandon v. U.S., 494 U.S. 152, 160 (1990).

The legislative history of § 1014 is not easily deciphered. The statute was enacted in 1948 as an amalgamation of 13 different preexisting false statement statutes. Counsel has been unable to locate any reference in the legislative histories

of § 1014 or its predecessors which speaks to the issues here at bar. Perhaps most telling, however, is that there appears to be no case law interpreting any of § 1014's predecessor statutes in a manner consistent with the Appellate Court's reading. It is doubtful that Congress intended to adopt an interpretation of § 1014 never previously evidenced in the case law. This is reinforced by the passing of 54 years without a single Court interpreting § 1014 in that manner.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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